CA on appeal from Chancery Division Leeds District Registry before Butler-Sloss LJ; Peter Gibson LJ; Thorpe LJ. 16th July 1997.

LORD JUSTICE BUTLER-SLOSS: I will ask Peter Gibson LJ to give the first judgment.

LORD JUSTICE PETER GIBSON:

1. On 30 March 1994 His Honour Judge Kolbert, after a lengthy trial, gave judgment on two petitions under section 459 of the Companies Act 1985. On 16 June 1994 he was addressed on costs and by his order of 1 July 1994 he made no order as to costs.

2. The petitioners appealed on costs alone. On 7 June 1996 this court allowed the appeal and ordered that the Judge's costs order be set aside and that there be substituted an order that the petitioners be awarded 80 per cent of their costs of the trial and of two other days as well as all the costs of the appeal. The order was slightly amended under the slip rule on 25 June 1996 after joint representations had been received from counsel. This was to make clear that the 80 per cent order was of the costs of the two petitions to the conclusion of the trial as well as of the two days and that the costs should be taxed if not agreed. That order was silent as to interest on costs. On taxation it was agreed that the 80 per cent order came to £170,000 excluding interest, but the parties then fell out over the question of interest on that sum.

3. The petitioners claimed that interest ran from the Judge's order; the respondent claimed that it ran only from the order of this court. That is a difference in excess of £25,000.

4. The petitioners applied for a charging order on the respondent's home to secure the interest. The respondent contended that until the starting date for the interest was agreed or determined the interest was not a liquidated sum and therefore no charging order could be made. The petitioners submitted that the interest was a liquidated sum because, without an order of this court exercising its discretion to backdate, the interest ran only from this court's order. The petitioners' argument prevailed before the District Judge who made the charging order.

5. Mr Evans for the petitioners now applies, in form under Order 20 Rule 11, for an order that the order of this court be backdated to 1 July 1994, the date of the Judge's costs order. His first argument, however, is that there is no need for such an order as, on the true construction of this court's order, ipso facto the order is backdated. There are, in my view, three reasons why this argument must be rejected. First, as Sir Richard Henn Collins MR said in ***Borthwick v Elderslie Steamship Co. (No. 2)*** [1905] 2 KB 516 at 519: *"The judgment [of the Court of Appeal reversing the lower court] is not ipso facto antedated by reason that it is substituted for the judgment ... below."*

6. Secondly, this court was not asked to backdate the order in question. The power in Order 42 Rule 3(1) was never brought to our attention. Thirdly, the petitioners have been blowing hot and cold on this point. Having argued before the District Judge one way and obtained an order on that argument, they cannot now be allowed to argue the contrary.

7. Can the petitioners now apply under Order 20 Rule 11? Or is this a case where the court can in the exercise of its inherent jurisdiction make the order for backdating the interest that is now sought? Order 20 Rule 11 provides that clerical mistakes in judgments or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court on motion or summons without an appeal.

8. Whilst it might be thought that this rule was directed at errors of the court, there are a number of decisions which indicate that a wider construction is permitted of the rule. In particular, we have been shown two decisions: ***In re Inchcape*** [1942] Ch. 394 and ***Fritz v Hobson*** (1880) 14 Ch. D. 542. In each of those cases there was an omission by counsel to ask for costs. In each case the court was prepared to make the order requested. In ***Fritz v Hobson*** Fry J also said this (page 561): *"According to my understanding of the practice (and this is confirmed by what the Master of the Rolls has said), all orders of the Court carry with them in gremio liberty to apply to the Court."*

9. Accordingly in that case, where counsel had omitted to ask for the costs of an interlocutory injunction, the court was prepared to make an order dealing with the costs and Fry J was prepared to do so under the inherent jurisdiction as well as under the then equivalent of Order 20 Rule 11.

10. Mr Brook Smith, in opposing the application, has drawn our attention to ***Mutual Shipping v Bay Shore Shipping*** [1985] 1 WLR 625. This was a case dealing with the question whether an error of an arbitrator could be corrected. The judgment of Sir John Donaldson MR included a passage dealing with an error by an arbitrator or judge. At page 633 the Master of the Rolls said: *"If [an arbitrator or judge] assesses the evidence wrongly or misconstrues or misappreciates the law, the resulting award or judgment will be erroneous, but it cannot be corrected either under section 17 of the [Arbitration] Act of 1950 or under R.S.C., Ord. 20, r. 11."*

11. He was not dealing with the situation where the error arises from a mistake by counsel or of one of the parties. Robert Goff LJ at page 636 listed the relevant authorities where the error so arising was corrected and pointed out that in none of the cases did the judgment or order as drawn fail to give effect to the intention of the court at the time it was drawn. In each case there was an error in the judgment or order arising from an accidental slip or omission by a party or by his counsel or by his solicitor.

12. Mr Brook Smith says that in the present case the sworn evidence filed on behalf of the petitioners shows that the error was simply a misappreciation of the law. Ergo, he says, it is not an error arising from an accidental slip or omission and he relies on what the Master of the Rolls said in the passage to which I have referred.

13. However, that passage was not directed to mistakes by counsel or by a party. Mr Evans commenced his submissions to us by saying that he accepted that he had made a mistake. For my part, I am prepared to accept that statement by counsel. It was an omission which we can correct. If one considers the decision of this court in ***Kuwait Airways Corporation v Iraqi Airways Co. (No. 2)*** [1994] 1 WLR 985 and in particular the judgments of Leggatt LJ at page 987 and Nourse LJ at page 989, it is apparent that in the ordinary case it will be just that the court should exercise its power to backdate that part of its order for costs which relates to the costs of the action. No doubt there will be special circumstances in some cases which would make it unjust to make such an order. But in the ordinary case, and to my mind plainly the present is such an ordinary case, the court would backdate the order as regards interest on costs, at any rate were the application is made timeously.

14. It seems to me that on the authorities this court can make such an order after its order has been drawn up either under Order 20 Rule 11 or in the exercise of its inherent jurisdiction in that, as Fry J said, there is always liberty to apply to the court in relation to its own order. Indeed this court habitually makes further orders after its own orders have been drawn up, for example when there is an application for leave to appeal to the House of Lords which a party has not made at the time that the judgment was given. This court does not normally spend time going into the reasons why such an application was not made earlier. It simply considers the merits and it treats itself as having the jurisdiction. It is unnecessary to decide whether it does so under Order 20 Rule 11 or under the inherent jurisdiction. Plainly justice requires that the court should be able to deal with such applications at a later date.

15. However, if the court can correct the omission, as Mr Brook Smith has said, there are two elements of discretion. The court has to consider whether it will add to the order which it has already made and whether it will backdate.

16. Nothing has been said to us, in my judgment, which would militate against the ordinary rule applying, that is to say that there should be a backdating. True it is that there has been a delay. This application could have been made in June 1996 and indeed should have been made then, but it is possible to deal with any prejudice arising from that when we come to hear any application on costs.

17. There has been a short delay between February and April 1997: in February the question of applying to the court was mentioned in correspondence from the petitioners' solicitors to the respondent's solicitors and it was not until 29 April that the application was made, but no prejudice has been shown by the respondent to have been suffered. Although this is, as Mr Brook Smith says, an offensive application in that it is seeking to add a burden onto the respondent, for my part I do not see that justice requires the petitioners to be denied what would have been the usual order had it been made timeously. I repeat we can deal with the question of the prejudice caused by the belated application today by way of a costs order. For my part, therefore, I would be prepared to accede to Mr Evans' application and make the order enabling the interest on the costs to be backdated to 1 July 1994.

LORD JUSTICE THORPE:

18. I agree.

LORD JUSTICE BUTLER-SLOSS:

19. I also agree. So the application is granted and we will add to our order of 7 June 1996 whereby the petitioners had 80 per cent of their costs and that order is to be with interest to be backdated to the order of His Honour Judge Kolbert of 1 July 1994.

Order: Application granted; applicants to pay the costs of the application.

MR T EVANS (Instructed by Messrs Booth & Co., Leeds, L81 1HQ) appeared on behalf of the Applicants
MR P BROOK SMITH (Instructed by Messrs Hammond Suddards, Leeds, LS3 1ES) appeared on behalf of the Respondent